

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

AF/1761\$

Applicant: John Rebhorn et al.

Examiner: Robert A. Madsen

Serial No.: 09/781,582

Group Art Unit: 1761

Filed: February 12, 2001

Docket No.: 5515USA (G180.137.101)

Due Date: October 27, 2003

Title: PORTABLE, SIDE-BY-SIDE COMPARTMENT CONTAINER AND METHOD FOR SEPARATELY STORING AND DISPENSING TWO CONSUMABLE PRODUCTS, ESPECIALLY CEREAL AND MILK

Mail Stop Appeal Brief – Patents
 The Honorable Commissioner of Patents and Trademarks
 P.O. Box 1450
 Alexandria, VA 22313-1450

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- ☒ Reply Brief to the Board of Patent Appeals and Interferences of the U.S. Patent and Trademark Office (17 pgs.).
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	(1) Claims Remaining After Amendment		(2) Highest Number Previously Paid For	(3) Present Extra	Rate	Fee
TOTAL CLAIMS	50	-	51	0	x 18.00 =	\$0.00
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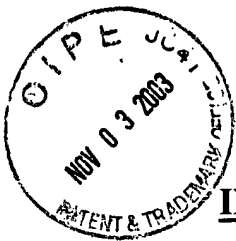
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By:
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REPLY BRIEF TO THE BOARD OF PATENT APPEALS AND INTERFERENCES OF
THE UNITED STATES PATENT AND TRADEMARK OFFICE

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Dear Sir or Madam:

This Reply Brief is presented in response to the Examiner's Answer dated August 27, 2003 and in support of the Notice of Appeal filed February 26, 2003 from the final rejection dated November 6, 2002 rejecting claims 1-51 of the above-identified application. Fifty-one claims remain for consideration. Appellant respectfully requests reversal of the Examiner's rejections of pending claims 1-51.

REPLY TO EXAMINER'S ARGUMENTS

Rejections under 35 U.S.C. §102

A. Rejection of Claims 1, 4-9, 13, 16 and 48 in View of the '064 Patent

Appellant reasserts that the '064 Patent does not anticipate claim 1, or more particularly, does not disclose assembly of first and second compartments such that the mouth of the second

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compartment abuts the spout of the first compartment as required by claim 1. When construing terms within a claim, the common or ordinary meaning controls unless the inventor clearly indicates that he or she has adopted an uncommon or new definition of the term used in the claim. *See e.g., Process Control Corp. v. HydReclaim Corp.*, 190 F.3d 1350, 1357, 52 USPQ2d 1029, 1033 (Fed. Cir. 1999). The ordinary meaning of the term “abut” is “to border on” or “to touch along a border.” *Merriam-Webster’s Collegiate Dictionary*, 10th Ed., p. 5. The specification uses the term “abut” in a manner entirely consistent with this ordinary meaning and does not indicate an alternative definition for the term. Particularly looking to page 3, lines 18-21 of the specification, the passage cited in the Examiner’s Answer, “abut” is used in its ordinary sense. The first sentence of the passage states how the compartments are assembled together by stating the following two separate characteristics: (1) in a side-by-side fashion and (2) so that the spout abuts the mouth. The second sentence of the cited passage merely explains that the assembly described in the first sentence of the passage allows the two products to be dispensed in close proximity. Not only is such usage consistent with the ordinary meaning of “abut,” but also nothing in the cited passage suggests giving “abut” a different or unusual meaning as suggested in the Examiner’s Answer. Accordingly giving “abut” its ordinary meaning, the limitations of claim 1 require the mouth to touch or border the spout. The tubes 1 and 3 of the ‘064 Patent do not disclose such an arrangement, and the Examiner has not argued that the “mouth” and the “spout” of the ‘064 Patent touch one another. Rather, the embodiments of the ‘064 Patent disclose the two openings being clearly spaced from each other. *See the ‘064 Patent, Figs. 1-8*. Clearly, then, the ‘064 Patent mouth and spout do not abut one another. As a result of at least the above described reasons, Appellant reiterates that claim 1 and claims 4-9, 13, 16, and 48, which depend from claim 1, are not anticipated by the ‘064 Patent.

B. Rejection of Claims 1-12, 16-19, 47, and 48 in View of the ‘561 Patent and the ‘289 Patent

Appellant reiterates that the ‘561 Patent and the ‘289 Patent (collectively referred to as “the Ness Patents”) both fail to disclose the limitations of independent claim 1. In particular,

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Appellant reasserts that the Ness Patents fail to disclose a spout and mouth positioned such that the respective internal surfaces define an interior section and an exterior section, the exterior section of the spout internal surface having a radius differing from a radius of the exterior section of the mouth internal surface. To this end, it is respectfully submitted that the Examiner has misread the language of claim 1. Notably, the Appellant does not suggest that the exterior section is “the section forming the external surface of the container” as proposed in the Examiner’s Answer (Page 19, emphasis added). Further, the Examiner’s statement that “the exterior section of the mouth or spout is merely outside of the internal surfaces of the mouth and spout” (Examiner’s Answer, page 19) misstates the language of claim 1. Appellant’s position is based upon the language of claim 1, which states that “the spout and mouth are positioned such that each of the respective internal surfaces define an interior section and an exterior section, the exterior section of the spout internal surface having a radius differing from a radius of the exterior section of the mouth internal surface.” Not only does the claim language state that each of the internal surfaces of the spout and mouth define an interior section and an exterior section, but the claim language states the exterior section is part of the spout internal surface and the exterior section is part of the mouth internal surface. In particular, claim 1 makes use of the preposition “of.” The ordinary meaning of the term “of” is “to indicate the whole that includes the part denoted by the preceding word.” *Merriam-Webster’s Collegiate Dictionary*, 10th Ed., p. 804. As such, the claim passage, which recites “the exterior section of the spout internal surface,” defines the spout internal surface (i.e., the whole) as including the exterior section (i.e., the part). Similarly, the mouth internal surface also includes an exterior section. In contrast, the Examiner has apparently read “the exterior section” language to mean something explicitly not part of the “mouth internal surface” or the “spout internal surface.” Thus, the Examiner’s rejection of claim 1 in light of the Ness Patents is based upon an incorrect reading of the claim language.

The Ness Patents fail to disclose properly construed limitations of claim 1. In particular, the convex perspective of the wall 17 cited by the Examiner cannot properly be read to be the exterior section of the inner surface of the upper portion of the compartment 16 since the convex

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perspective of the wall 17 is not part of the inner surface of the upper portion of the compartment 16 (i.e., the whole). Rather, the exterior section as used in claim 1 refers to the exterior portion of the inner surface with respect to the positioning of the opposing compartment. As such, turning to the Ness Patents, the exterior surfaces must be defined as previously noted and illustrated in the Appeal Brief and accompanying Appendix B. As noted, the exterior sections "D" and "E" are both formed as the back surface (i.e., the surface opposite) the threads 24, which must be circular to facilitate the threaded connection of the lid 14 to the container 10. Accordingly, the exterior section "D" of the mouth internal surface "A" and the exterior section "E" of the internal surface of the spout "B," as designated in the Appeal Brief, collectively form a circle and, therefore, must have identical radii. Since the Ness Patents only define exterior sections of the internal surfaces having identical radii, the Ness Patents fail to disclose an exterior section of the spout internal surface with a radius differing from the radius of the exterior section of the mouth internal surface as recited in claim 1.

Moreover, Appellant reiterates that the Ness Patents fail to disclose a first and a second compartment tapering at an upper portion thereof to form a spout or mouth, respectively, also recited in claim 1. Once again beginning with the ordinary meaning of a term, "tapering" ordinarily means "to become gradually narrower or thinner towards one end," *American Heritage Dictionary of the English Language*, p. 1835 (1992), or to become "progressively smaller towards one end." *Merriam-Webster's Collegiate Dictionary*, 10th Ed., p. 5. In view of the proper meaning of "tapering," the compartments 16 and 18 of the Ness Patents do not taper at an upper portion thereof to form a spout and mouth. Although the compartments 16 and 18 are slightly smaller at the threads 24 as noted by the Examiner, the threads 24 do not "taper." Rather, the compartments 16 and 18 become abruptly smaller at the threads 24 as indicated by the horizontal ledge created where the container transitions to the threads 24. The only gradual transition or tapering of the compartments 16 is 18 is to become larger at the upper portion thereof, in direct contrast to the limitations of claim 1.

For at least the above described reasons, the Ness Patents fail to anticipate the limitations of claim 1. Similarly, the Ness Patents fail to anticipate the limitations of the dependent claims

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2-12, 16-19, 38-40, 42, and 46-48, each of which incorporates the limitations of claim 1.

Consequently, claims 1-12, 16-19, 38-40, 42, and 46-48 are believed to be allowable over the Ness Patents.

C. Rejection of Claims 38-40, 42, and 46 in View of the '561 Patent and the '289 Patent

Appellant reasserts that none of the embodiments of the Ness Patents disclose or otherwise suggest covering the spout separate of the mouth with a seal and covering the mouth and seal with a cover as recited in independent claim 38 on which claims 39-40, 42, and 46 depend. By the Examiner's Answer, it is clear that the Examiner relies solely upon Figure 6 of the Ness Patents. Figure 6 clearly does not include separable compartments and, thus, cannot anticipate claim 38. Further, the compartments 86 and 88 clearly do not taper to form a spout or mouth as required by claim 38. Instead, the mouth and spout are provided by a separate cover 84; claim 38 requires that the spout be formed apart from the cover, again dictating that Figure 6 does not anticipate claim 38. Further, the food container 80 includes a liquid food compartment 86 and a dry food compartment 88. The opening of the liquid food compartment is separately covered with the drip free spout 96 and the Ness Patents state that a cap can be provided for sealing the dry food opening 98 from the environment. *See the '289 Patent, column 5, lines 22-28.* In the Examiner's Answer, the Examiner has referenced the drip free spout 96 of the Ness Patents as being the "seal" of claim 38. According to the language of claim 38, this "seal" 96 of the Ness Patents must be covered by a separate cover. This is clearly not the case, and the Examiner has offered no argument to the contrary. Although the Ness Patent discloses separate covers or caps for the two compartment openings, neither Figure 6 nor the specification discloses collectively covering the mouth and the seal, which is otherwise applied over the spout, with a cover. In particular, although the Ness Patents suggests covering the dry food opening 98 with a cap, the Ness Patents do not disclose covering the dry food opening 98 and the drip free spout 96 with a single cap or a cover as required by the limitations of independent claim 38.

Therefore, for the reasons provided herein as well as the reasons provided in the Appellant's Brief on Appeal, Appellant respectfully reiterates that the Ness Patents fail to

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disclose the limitations of claim 38, and as a result, the Ness Patents do not anticipate claim 38. For at least these same reasons, dependent claims 39, 40, 42, and 46 incorporating the limitations of claim 38 are not anticipated by the Ness Patents and are believed to be allowable.

D. Rejection of Claims 38 and 44-46 in View of the '417 Patent as Evidenced by the '422 Patent

Appellant maintains that claims 38 and 44-46 are not anticipated by the '417 Patent. Once again, Appellant reiterates that the limitations of independent claim 38 not only require the spout to be covered separate of the mouth as cited in the Examiner's Answer but also, and more importantly for this analysis, require covering the mouth and the seal with a cover. It is respectfully submitted that the Examiner has failed to fully address this limitation. Considering the '417 Patent with the nozzle 59 as the spout and the nozzle 60 as the mouth, as inferred in the Examiner's Answer, the cap 59A may be considered to seal the spout separate of the mouth. However, although cap 60A covers the nozzle or mouth 60, neither the cap 60A nor any other cap or cover covers both the mouth 60 and the seal 59A over the spout as required for the cover recited in independent claim 38. Therefore, although the '417 Patent may recite a separate cover for the spout and the mouth, the '417 Patent does not disclose the steps of covering the mouth with a seal and covering the seal with a cover as recited in independent claim 38. As a result, the '417 Patent does not anticipate independent claim 38 or the dependent claims 44, 45, and 46 incorporating the limitations of independent claim 38. Consequently, Appellant reasserts that claims 38 and 44-46 are not anticipated by the '417 Patent and are allowable.

Rejections Under 35 U.S.C. §103**A. Rejection of Claim 14 over the '289 Patent in view of the '417 Patent**

Appellant resubmits that the invention of claim 14 is nonobvious over the '289 Patent in view of the '417 Patent. As described above, independent claim 1 is not taught or otherwise suggested by the '289 Patent (described above as one of the Ness Patents). The Examiner has not advanced that the '417 Patent teaches any of the limitations of claim 1, and therefore, the

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'417 Patent fails to alter the above analysis of claim 1. In addition, the '289 Patent describes that if the compartments are formed as individual pieces, the individual pieces are joined by interlocking or snapping together. *See the '289 Patent, column 5, lines 49-65.* As such, there is no suggestion to look to the '417 for a way to secure the first and second compartments together, namely by a film wrapper as recited in claim 14, since the '289 Patent already teaches the two pieces secured together. Therefore, as dependent claim 14 depends from and incorporates the limitations of claim 1 not taught or otherwise suggested by the cited references, claim 14 is nonobvious over the cited references. As a result, the Appellant reiterates that claim 14 is allowable.

B. Rejection of Claim 15 over the '289 Patent in view of the '679 Patent

Appellant reasserts that claim 15 is nonobvious and allowable over the '289 Patent in view of the '679 Patent. The Examiner has not asserted that the '679 Patent teaches or suggests any of the limitations of claim 1. Therefore, the '679 Patent fails to alter the above analysis of claim 1 in which claim 1 is believed to be allowable. As such, Appellant reiterates that the '289 Patent and the '679 Patent both fail to teach or otherwise suggest the limitations of claim 15 that are incorporated from independent claim 1. Consequently, claim 15 is believed to be nonobvious and allowable over the cited references.

C. Rejection of Claims 19-21 and 49 over the '289 Patent in view of the '449 Patent and the '311 Patent

Appellant resubmits that claims 19-21 and 49 are nonobvious and allowable over the '289 Patent and the '311 Patent. Each of dependent claims 20-21 and 49 depend from independent claim 19. Referring to the embodiment of Figure 6 of the '289 Patent, specifically referenced in the Examiner's Answer, the '289 Patent fails to teach or otherwise suggest two compartments tapering at an upper portion thereof and being assembled to one another. In particular, as cited by the Examiner, the divided compartment cups of the '289 Patent "run from the bottom to the top of the base unit." *Emphasis added. See the '289 Patent, column 5, lines*

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30-33. These divided compartment cups snap together to collectively receive the lid 84 as illustrated in Figure 6. As noted on page 24 of the Examiner's Answer, the lid 84 forms the tapered mouth and spout (near item 96), not the separately divided compartments. As such, neither divided compartment tapers at an upper portion thereof to form a spout or mouth before being assembled together and collectively receiving the lid 84. This contrasts the limitations of claim 19, which requires separately formed compartments each tapering at an upper portion thereof to form a spout or mouth. The separately formed compartments are assembled to one another. Therefore, since the "spout" and "mouth" of the '289 Patent are formed simultaneously upon application of the single lid 84 to the compartments 86 and 88, the '289 Patent fails to teach or otherwise suggest the limitations of claim 19.

The '289 Patent also fails to teach or otherwise suggest a first compartment tapering at an upper portion thereof to form a spout having a curved, convex interior wall and a second compartment tapering at an upper portion thereof to form a mouth having a curved, concave interior wall. Notably, in this manner, claim 19 requires the spout and mouth to have the curved wall, not the remaining compartment. As such, since the upper openings of the lid 84 are referred to by the Examiner as the spout and mouth in order to meet the tapering limitations of claim 19, these openings of the lid 84 must define the curved walls to meet the limitations of claim 19. Neither Figure 6 nor the associated passages of the '289 Patent describe the physical characteristics of the openings of the compartments 86 and 88 other than the opening of the compartment 86 being sized to receive a spout 96. Importantly, the Examiner's reference that other embodiments (e.g., figures) of the '289 Patent show the smaller milk compartment is concave and the larger second cereal compartment is convex has simply no bearing on the concave/convex limitations of claim 19. The concave/convex wall 17 of Figure 3 of the '289 Patent is not part of the mouth or spout. In fact, Figures 1 and 2 of the '289 Patent are the only views providing mouth and spout features and such features are entirely convex. As to the Examiner's assertion that perhaps other mouth/spout designs can be attributed to Figure 6, it is impermissible to pick and choose only certain portions of a reference to the exclusion of other necessary portions of the same reference. *Bausch & Lomb, Inc. v. Barnes-Hind Hydrocurve,*

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Inc., 796 F.2d 443, 448 (Fed. Cir. 1986). As such, the '289 Patent fails to teach or otherwise suggest such limitations regarding the interior walls of the mouth and spout.

Appellant maintains that the '289 Patent teaches against modification as described in the Appeal Brief. However, even if the cited references are combined, neither the '449 Patent nor the '311 Patent alter the analysis of claim 19. In particular, turning to Figure 2 and Figure 4 of the '449 Patent, containers 1 and 2 fail to taper, or gradually narrow at an upper portion thereof to form a spout or a mouth. Rather, the side walls of containers 1 and 2 extend in a substantially vertical manner from the common interval bottom 9. Further, turning to Figure 4, which is a longitudinal section at a right angle to the illustration of Figure 2, the container 2 includes a thickened portion 14 having its greatest thickness at 15 which is adjacent the integral bottom 9. As such, the container 2 actually becomes gradually larger at an upper portion thereof, in direct contrast to the limitations of independent claim 19. Therefore, the '449 Patent cannot be viewed as teaching or otherwise suggesting the limitations of compartments tapering at an upper portion thereof to form a spout or a mouth. Consequently, since the '449 Patent fails to teach or otherwise suggest tapering to form a spout and mouth, the '449 Patent also fails to teach such a spout and mouth having the particular curved interior walls. At the very most, the '449 Patent may suggest a particular curvature of the compartment divider wall, rather than of an interior wall of a spout or mouth as recited in claim 19.

Turning to the '311 Patent, the bowl 1 also fails to teach such limitations. In particular, with reference to Figure 3, the bowl 1 has a rounded concave bottom 2 with a rim 3 rising therefrom. *See the '311 Patent, column 1, lines 40-44.* Due to the rounded lower nature of the bowl 1, the sections 5 and 6 actually become larger near their upper portions. As such, the sections 5 and 6 do not taper at an upper portion thereof to form a spout or a mouth. Accordingly, the '311 Patent cannot be viewed as teaching or otherwise suggesting a spout and mouth each forming a particularly curved wall, as recited in claim 19. Therefore, at the very most, the '311 Patent may be viewed as teaching a curved compartment divider wall. The '311 Patent, however, fails to teach or otherwise suggest tapering to form a spout and mouth at all and, consequently, also fails to teach forming a spout and mouth having particular characteristics

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such as concave or convex interior walls.

Due to at least these reasons and the reasons described in the Appeal Brief, neither the '289 Patent, the '449 Patent, nor the '311 Patent teach or otherwise suggest either a spout or a mouth formed by compartment tapering that also defines a curved wall with the particular orientation described in independent claim 19. Since dependent claims 20, 21 and 49 incorporate the limitations of independent claim 19, the cited references also fail to teach or otherwise suggest the dependent claims 20, 21 and 49. Therefore, Appellant reiterates that claims 19-21 and 49 are nonobvious and allowable.

D. Rejection of claims 22-28 and 32-34 over the '289 Patent in view of the '449 Patent and the '311 Patent

Appellant resubmits that the invention of independent claim 22 is nonobvious over the '289 Patent in view of the '449 Patent and the '311 Patent. In particular, the cited references fail to teach a second compartment opening including a transverse concave section and having a transverse cross-sectional area less than a maximum transverse cross-sectional area of the second compartment. With the Examiner's Answer, the Examiner is explicitly relying only of Figure 6 of the '289 Patent. *Examiner's Answer, pages 25-26*. However, Figure 6 of the '289 Patent does not teach such limitations for similar reasons as described above with respect to claim 19.

In particular, if the top rib 92 is considered to form the compartment openings of claim 22, then the '289 Patent fails to teach a compartment opening having a transverse cross-sectional area less than a maximum transverse cross-sectional area of the second compartment as well as at least one of the openings being substantially centered relative the body of the container. Alternatively, if the openings in the lid 84 are considered to be the compartment openings of claim 22, then the '289 Patent fails to teach or otherwise suggest a second compartment opening including a transverse concave section. Once again, the passages cited in the Examiner's Answer (the '289 Patent, column 5, lines 35-37; column 6, lines 22-31) relate only the divider wall between the compartments rather than an interior wall of the actual openings. The cited passages and the rest of the '289 Patent are silent with respect to the size, shape, and relationship

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of the separately formed compartment openings as referred to in Figure 6.

Even if assumed for argumentative purposes that the suggestion to combine the cited references exists, the additionally cited references fail to collectively teach or otherwise suggest a second compartment opening including a transverse concave section and having a transverse cross-sectional area less than a maximum transverse cross-sectional area of the second compartment as recited in independent claim 22 and not taught in the '289 Patent. In particular, the top openings of the '449 Patent and the '311 Patent are at the top of the compartments and are larger than any other cross-section of the respective compartment. Therefore, neither the '449 Patent nor the '311 Patent describe any opening having a transverse cross-sectional area less than a maximum transverse cross-sectional area of the second compartment, and as such, neither reference can be seen as teaching or suggesting such a second compartment opening that further includes a concave section. As previously described, the '449 Patent, includes a wall 10 having a concave relationship with the compartment formed by the container 1. However, this relationship is due to the overall formation of the compartment or containers 1 and 2 rather than referring to a specific element of an opening. Similarly, the partition 7 of the '311 Patent is convex with respect to the major section 5. Once again, however, this relationship is formed by the main compartment rather than the mouth, and is not specified with respect to an opening having a transverse cross-sectional area with less than a maximum cross-sectional area with separate compartments. As such, at the very most, the '449 Patent and the '311 Patent could only be viewed as suggesting modification of the compartment divider wall 94 of the '289 Patent rather than an interior wall of the spout or mouth as recited in claim 22. Notably, the Appellant does not believe that the '449 Patent or the '311 Patent suggest such modifications of the '289 Patent for reasons described in the Appellant's Appeal Brief.

For at least the above described reasons and the reasons described in the Appeal Brief, Appellant reasserts that independent claim 22 and dependent claims 23-28 and 32-34, which incorporate the limitations of independent claim 22, are allowable over the cited references.

With regard to claim 27, Appellant reasserts that claim 27 includes further patentably distinct limitations. In particular, as stated in the Appellant's Appeal Brief, the '289 Patent fails

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to teach or otherwise suggest an integrally formed spout defined in the first compartment opening. Referring to each of the figures of the '289 Patent, including Figure 6 specifically cited in the Examiner's Answer, each embodiment includes a separate cover or lid 14, 62, or 84 which interfaces with the lower compartment to form a spout. As such, the spout is formed as a separate piece or lid than the compartment bodies. Forming the spout on a separate piece than the compartment is in direct contrast to the limitations of claim 27 in which the first compartment includes an integrally formed spout defining a first compartment opening. The Examiner has given no argument as to the failure of Figure 6 to teach, let alone suggest, compartments with integrally formed mouth or spout.

The '289 Patent fails to teach or otherwise suggest a first compartment that includes an integrally, i.e. homogenously, formed spout defining the first compartment opening as recited in claim 27. In particular, the intended purpose of the '289 Patent to have a reusable container teaches against the structured limitation of homogenously forming the lid and cup as such a structural arrangement would render the container of the '289 Patent nearly impossible to clean. *See Ex Parte Thompson*, 184 USPQ 558, 559 (Bd. App. 1974). Moreover, as described above, the '449 Patent and the '311 Patent also fail to provide for formation of an opening having a transverse cross-sectional area less than the maximum transverse cross-sectional area of the compartment and, therefore, also fail to define such a first compartment opening formed as a spout. For these additional reasons, claim 27 is nonobvious over the '289 Patent in view of the '449 Patent and '311 Patent. Claims 28 and 29 depend from and incorporate the limitations of claim 27. Therefore, claims 27-29 are believed to be allowable over the cited references.

E. Rejection of Claim 29 over the '289 Patent in view of the '449 Patent, the '311 Patent, and the '064 Patent

Appellant reasserts that claim 29 is allowable over the '289 Patent in view of the '449 Patent, the '311 Patent, and the '064 Patent. Claim 29 depends directly from claim 27 and indirectly depends from claim 22. As described above, claims 22 and 27 are not taught or otherwise suggested by the '289 Patent in view of the '489 Patent and the '311 Patent. The Examiner has not relied upon the '064 Patent to remedy the deficiencies of the '289 Patent, the

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'289 Patent and the '311 Patent discussed above. Therefore, Appellant resubmits that the container of claim 29 is nonobvious and allowable over the '289 Patent in view of the '449 Patent, the '311 Patent, and the '064 Patent.

F. Rejection of Claim 30 over the '289 Patent in view of the '449 Patent, the '311 Patent, and the '417 Patent

Appellant maintains that claim 30 is nonobvious and allowable over the '449 Patent, the '311 Patent, and the '417 Patent. Claim 30 depends from and incorporates the limitations of independent claim 22. As previously described, claim 22 is not taught or otherwise suggested by the '289 Patent in view of the '489 Patent and the '311 Patent. Addition of the '417 Patent fails to alter this analysis as the '417 Patent does not teach or otherwise suggest the limitations described above as not being taught by the other cited patents. In the Examiner's Answer, the Examiner incorporates his analysis of claim 22 in which the Examiner relied solely on Figure 6 of the '289 Patent. In Figure 6 of the '289 Patent, the compartments 86 and 88 of the container 80 are formed as a single piece and, therefore, are not separable. Since the compartments 86 and 88 are not separable, there is no need to modify the container 80 to include a film wrapper to hold the compartments together. Furthermore, where the '289 Patent describes that the compartments as being individual pieces, the individual pieces are joined by interlocking or snapping together. *See the '289 Patent, column 5, lines 49-65.* Since the two compartments are already secured together by snapping, there is no suggestion to modify the container of the '289 Patent to secure the first and second compartments together by a film wrapper, as recited in claim 30. Therefore, Appellant resubmits that the claim 30 is nonobvious and allowable over the '289 Patent in view of the '449 Patent, the '311 Patent, and the '417 Patent.

G. Rejection of Claim 31 over the '289 Patent in view of the '449 Patent, the '311 Patent, and the '679 Patent

Appellant reasserts that claim 31 is nonobvious over the '449 Patent, the '311 Patent, and the '679 Patent. Claim 31 depends from and incorporates the limitations of independent

Reply Brief

Applicant: John Rebhorn et al.

Serial No.: 09/781,582

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claim 22. As previously described, the limitations of claim 22 is not taught or otherwise suggested by the '289 Patent in view of the '489 Patent and the '311 Patent. The Examiner has not relied on the '679 Patent to remedy the deficiencies of other cited references described above. Furthermore, the additional limitation of claim 31 requires a film secured across the first compartment opening (the smaller of the two openings) for sealing the first compartment. Such a limitation is not taught or suggested by the cited references. Figure 6 of the '289 Patent, which the rejection is based upon, illustrates the smaller of the two compartment openings including a drip free spout 96, which can be pulled out to open and pushed in to close. *See column 5, lines 22-28.* In order to allow the spout to move in and out of the opening in the lid 84, the '289 Patent teaches against "a film secured across the first opening for sealing the first compartment" where the first opening is smaller than the second opening as described in claim 31 as such a film would impede movement of the spout 96 within the opening. As such, there is no suggestion to modify the '289 Patent to incorporate the limitation of claim 31. Therefore, Appellant resubmits that claim 31 is nonobvious over the '289 Patent in view of the '449 Patent, the '311 Patent, and the '679 Patent.

H. Rejection of claims 35-37, 50, and 51 over the '289 Patent

Appellant reasserts that claims 35-37, 50, and 51 are nonobvious and allowable over the '289 Patent. In particular, independent claim 35 recites a first compartment, a second compartment, a first compartment opening, and a second compartment opening having a transverse cross-sectional area at least three time greater than a transverse cross-sectional area of the first compartment opening. Although the Examiner suggests that the first compartment opening has a smaller transverse cross-sectional area than the second compartment opening, the Examiner fails to acknowledge the "at least three times greater" limitation of claim 35. Particularly referring to Figure 6 of the '289 Patent, the compartment opening of the second compartment 88 formed in the lid 84 is not three times greater in transverse cross-sectional area than the opening of the first compartment 86 formed in the lid 84, nevertheless is the opening four or five times greater as recited in claims 50 and 51, respectively.

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Contrary to that averred in the Examiner's Answer, Appellant does not contend that a new element, in particular, a means for product dispersion, be read from the specification into the claims. Rather, Appellant asserts that claim 35 is nonobvious because there is no suggestion to modify the openings of the two compartments formed by the rib 95 of the '289 Patent to have a transverse cross-section less than a maximum transverse cross-section of the respective compartment 86 or 88. See *In re Kotzab*, 217, F.3d 1365, 1370, 55 USPQ2d 1313, 1317 (Fed. Cir. 2000). In particular, since the '289 Patent teaches a separate lid 84 with smaller, more controlled openings, there is no reason or motivation to modify the openings formed by the rib 95 to have a smaller transverse cross-section than their respective compartment 86 and 88 because product dispersion is already controlled by the openings of the lid 84. Since there is no suggestions or motivation to modify the '289 Patent without looking to the Appellant's application, the Examiner has failed to show a *prima facie* case of obvious of claim 35 in view of the '289 Patent.

For at least these reasons and the reasons described in the Appellant's Appeal Brief, claim 35 is nonobvious and allowable over the '289 Patent. Dependent claims 36, 37, 50, and 51 incorporate the limitations of independent claim 35 and, therefore, are also nonobvious and allowable over the '289 Patent.

I. Rejection of Claims 41 and 43 over the '289 Patent in view of the '679 Patent

Appellant resubmits that the inventions of claims 41 and 43 are nonobvious over the '289 Patent in view of the '679 Patent. Both claims 41 and 43 depend from independent claim 38, which as previously described is not taught or otherwise suggested by the '289 Patent. In particular, as described above the '289 Patent fails to suggest compartments that taper at an upper portion thereof to form a spout or mouth or covering the mouth and the seal, which separately covers the spout, with a cover (a limitation never fully addressed by the Examiner). The Examiner has not relied on the '679 Patent to teach such a limitation. As such, the limitations of independent claim 38, which are incorporated by dependent claims 41 and 43, are nonobvious over the '289 Patent in view of the '679 Patent.

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In addition, the Appellant reasserts that the additional limitation of claim 41 including the step of "aseptically sterilizing the first compartment before dispensing the first consumable product," as the filling of a first compartment at home, as disclosed in the '289 Patent, is not conducive to aseptically sterilizing the first compartment as suggested in the Examiner's Answer since a consumer's home or kitchen is not an aseptically sterilized environment. Furthermore, the passage of the '679 Patent relied upon by the Examiner, namely column 1, lines 13-47, achieves aseptically sterilizing the milk by providing an aseptically packaged brick, which can then be placed into a compartmentalized tray. As such, the '679 Patent does not teach the first compartment itself as being aseptically sterilized as recited in claim 41 and incorporated by claim 43. Rather, the separately packaged aseptic brick container of milk is placed into the unsterilized compartment. Therefore, the '679 Patent fails to teach the alternative step of packaging milk as described in the limitations of claim 41 and incorporated in the limitations of claim 43. For at least the above described reasons, Appellant respectfully resubmits claims 41 and 43 are nonobvious over the '289 Patent in view of the '679 Patent.

CONCLUSION

For the above reasons, Appellant respectfully submits that the cited art neither anticipates nor renders the claimed invention obvious and, therefore, that the claimed invention is patentably distinguished over the cited art. Accordingly, Appellant respectfully submits that the above rejections to pending claims 1-51 must be withdrawn and that claims 1-51 be allowed.

Applicants have enclosed a check for fees as set forth under 37 C.F.R. 1.17(c). However, if additional fees are required, the Patent Office is hereby authorized to charge Deposit Account No. 500471.

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Please charge any additional fees or credit any overpayments to PTO Deposit Account
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Respectfully submitted,

John Rebhorn et al.,

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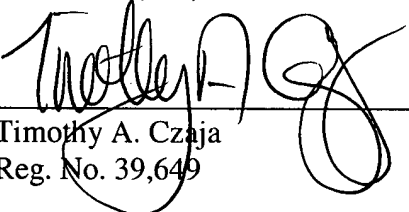
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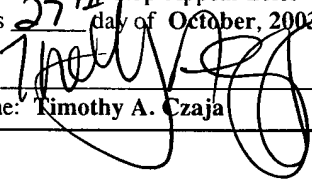
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CERTIFICATE UNDER 37 C.F.R. 1.8:

The undersigned hereby certifies that this paper or papers, as described herein, are being deposited in the United States Postal Service, as first class mail, in an envelope addressed to: ~~Mail Stop~~ Stop Appeal Brief - Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on this 27th day of October, 2003.

By 

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